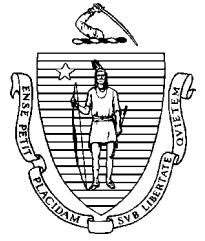




Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-94-10

FACTS:

The Governor's Advisory Commission on Domestic Violence (Advisory Commission) was established in July, 1993, pursuant to Executive Order No. 357. It succeeded the Domestic Violence Policy Group (DVPG) created in 1992 by Executive Order No. 334. The Advisory Commission's work was broadened from that of DVPG to include the response of the health, human services, educational and business communities, as well as law enforcement and the judiciary, to the problem of domestic violence. The Advisory Commission is charged with preparing recommendations regarding domestic violence, evaluating the success of state agencies and other public entities in responding to domestic violence victims, and recommending policy initiatives to improve services for victims and batterers. The Executive Order does not specify a formal work product to be prepared or completed by the Advisory Commission. The Governor and executive branch agencies are not required to adopt or implement any of the Advisory Commission's recommendations.

Under the Executive Order, the Advisory Commission is comprised of the Lieutenant Governor or his designee, the Secretary of Public Safety or her designee, the Secretary of Health and Human Services or his designee, and at least one representative from each of the following: the Attorney General's Office, the district attorneys, victims' assistance agencies, police departments, certified batterers treatment programs, the Trial Court and such other members as the Governor may appoint. At this time, the Advisory Commission includes the Commissioner of the Department of Probation, the Commissioner of Public Health, the Secretary of Education, several legislators, advocates for the victims of domestic violence and several service providers. The inclusion of "private members" (i.e., victim advocates and service providers) is designed to give the Advisory Commission a fuller understanding of and appreciation for the unique issues facing providers of services to both batterers and their victims. These private members provide the Governor with opinions and expertise which is not otherwise available within the Executive Branch.

The Executive Order designates the Lieutenant Governor as Chairman of the Advisory Commission. There is no fixed number of members, term of service, or required number of meetings per year. Members serve at the discretion of the Governor. The order specifies no voting protocol. In practice, the Commission has made recommendations based on a simple majority of those present, and has no established quorum. Several subcommittees have been established, and a number of interested parties who have not been officially appointed are participating in the work of the subcommittees. Parties who have previously worked with the subcommittees include executive branch employees who have been called upon to lend their expertise to the subcommittees, other interested public employees such as district attorneys and state and local police, and private individuals such as advocates and victims. The Executive Director of the Advisory Commission, which is not a formal position, is a state employee. None of the "private members" of the Commission are compensated for their work or reimbursed for their expenses, nor do they expend or control public funds as members of the Advisory Commission.

Recently, the Advisory Commission has become increasingly active in providing recommendations to a wide range of governmental bodies on issues involving domestic violence. These recommendations have focused on developing legislation, policies and programs to coordinate better the work between the criminal justice system and the social service programs. The following is a summary of these recent activities:

(1) Batterers' Treatment Subcommittee: This subcommittee, co-chaired by the Commissioner of the Department of Public Health (DPH), has been reviewing the guidelines for the certification of batterers treatment programs by DPH. Pursuant to the Abuse Prevention Act, 1990 Mass. Acts c. 403, a special judicial commission was created to develop batterers treatment program certification standards and guidelines. The initial set of guidelines provided that DPH could develop additional guidelines and could amend the current ones. Under c. 403 of the Acts of 1990, DPH has ongoing responsibility for certification and monitoring of batterers' treatment programs. Working with the Women's Health Division of DPH and with the Advisory Commission subcommittee, DPH has developed a set of proposed amendments to the current guidelines and DPH will be holding public hearings before finalizing the guidelines.

(2) Transition Subcommittee: This subcommittee has developed draft guidelines for visitation centers. The guidelines, which are general in nature, include recommendations for the training of personnel and standard procedures for dealing with victims and batterers. In addition, the subcommittee will review a needs assessment study conducted by Abt Associates on behalf of the Department of Social Services (DSS).^{1/} That study identifies the most pressing needs in shelters and related service programs. The subcommittee will evaluate, research and develop programmatic recommendations concerning gaps in services, which, pursuant to outside section 51 of Chapter 126 of the Acts of 1994 (the final supplementary appropriations bill for fiscal year 1994),^{2/} will be forwarded to the House and Senate Committees on Ways and Means.

(3) Uniform Enforcement Subcommittee: This subcommittee has drafted and circulated suggested guidelines for district attorneys in handling domestic violence cases. The subcommittee has incorporated into its draft guidelines comments it has received from the district attorneys. In addition, the subcommittee has prepared guidelines for police in responding to domestic violence incidents, including standardized report forms and investigation checklists.^{3/} This work has involved the State Police's Domestic Violence Unit. Both sets of guidelines have been approved by the Advisory Committee and are being forwarded to district attorneys and local police departments to use in their own discretion.

(4) Legislation Subcommittee: This subcommittee has reviewed all legislation relative to domestic violence, and has presented an overview to the Advisory Commission. Based on the subcommittee's recommendations, the Advisory Commission has endorsed a number of legislative initiatives. The Advisory Commission's endorsement was cited by the Administration in an effort to gain passage of legislation. Subcommittee members have also work on draft legislation regarding long-term housing assistance for victims of domestic abuse.

(5) Community Education Subcommittee: This subcommittee is preparing recommendations on violence in teen dating. These recommendations will likely focus on the role of the Executive Office of Education (EOE) in assisting schools to prevent dating violence. For example, the Advisory Commission may recommend that the EOE provide schools with information concerning programs and services on teen dating violence.

(6) Other Advisory Commission Projects: The Advisory Commission is involved in serving as a clearinghouse for "best practices" and new initiatives to combat domestic violence. Using funding from the Massachusetts Commission on Criminal Justice (MCCJ), the Advisory Commission and the MCCJ have produced and distributed a domestic violence newsletter.^{4/} Finally the Advisory Commission has made recommendations to the Governor concerning Administration budget requests.

QUESTIONS:

1. Will Advisory Commission members, who are not otherwise state employees (so called "private members"), be considered special state employees for purposes of the conflict of interest law?

2. If yes, what limitations will G.L. c. 268A place on the activities of those Advisory Commission members?

ANSWERS:

1. Yes, private members will be considered special state employees.
2. As special state employees, the private activities of private members will be restricted by the conflict of interest law in a limited manner as detailed below.

DISCUSSION:

1. Jurisdiction

For purposes of the conflict of interest law, a state employee is defined as “a person performing services for or holding an office, position, employment, or membership in a state agency,^{5/} whether by election, appointment, contract for hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council.” G.L. c. 268A, §1(q).

As we recently stated in *EC-COI-93-22*, we examine four factors in determining whether an advisory committee will be considered a state agency or instrumentality thereof. Those factors are:

- 1) the impetus for the creation of the committee (whether required by statute, rule, regulation or otherwise);
- 2) the degree of formality associated with the committee and its procedures;
- 3) whether members of the committee perform functions or tasks expected of government employees, or will they be expected to represent outside viewpoints;
- 4) the formality of the committee’s work product, if any. *EC-COI-86-4*; *86-5*.

Examining the Advisory Commission in light of these four factors, we begin by noting that the Advisory Commission was created by the Governor by executive order as opposed to by statute, rule, or regulation. *See EC-COI-83-21* (task force set up by governor on his own initiative as opposed to statutory requirement was not a public entity); *contrast EC-COI-82-157* (advisory council established by G.L. c. 7, §40M on a permanent basis rather than a temporary or ad hoc basis resulted in finding of state employee status for members). We have previously been more inclined to find a public instrumentality where a committee is a permanent and mandatory component to the implementation of a state statute. *See EC-COI-87-17* (Water Resources Management Advisory Committee of the Department of Environmental Quality Management established as a mandatory committee under St. 1985, c. 592); *86-4* (Administrative Penalties Advisory Committee mandatory and permanent committee pursuant to state statute). Here, in contrast, the Advisory Commission exists solely at the pleasure of the Governor and exists only so long as he deems it necessary and useful. Thus, it is neither mandatory nor permanent. However, this factor alone is not dispositive.

Our examination of the Advisory Commission in light of the remaining factors leads us to conclude that its structure, and more importantly, the tasks it performs, distinguishes it from the council analyzed in *EC-COI-93-22*, which we determined to be advisory in nature. We find that the Advisory Commission functions with a higher degree of formality than traditional advisory committees. Here, the Lieutenant Governor is

designated by executive order as the chairman. The Advisory Commission is organized into various subcommittees, each of which functions to carry out specific tasks. Although the Governor's executive order does not specify the total number of members, it does require the appointment of specific members, many of whom are public employees who are statutorily required to devise and administer programs regarding domestic violence. The Executive Order therefore contemplates a committee with a particular structure. Finally, we find significant that the Advisory Commission functions with the assistance of an executive director, who is a state employee. In contrast, the council in *EC-COI-93-22* did not have members who were otherwise employed by the Commonwealth. Moreover, that council did not have a chair designated by the Governor, nor did it utilize the services of an executive director.

We also find that the Advisory Commission members perform tasks ordinarily expected of public employees, rather than serving to represent outside viewpoints. *See EC-COI-87-17; EC-COI-86-5* (advisory committee set up to ensure that agency receives the informed opinions of a broad spectrum of the local population concerning the impact of an agency program would not be public instrumentality); *contrast 86-4* (finding state agency status where permanent committee's principal function is to assist in the drafting of regulations, a task ordinarily engaged in by public employees). In *EC-COI-93-22*, we found that members of an advisory council principally served to provide the Governor with outside viewpoints concerning the Massachusetts economy and the status of industry in the Commonwealth. Here, not only are a significant portion of the Advisory Commission members, as it is currently constituted, otherwise employed by the Commonwealth,⁶⁷ but also in examining the functions of the Advisory Commission, we find that, through subcommittees, the Commission performs tasks ordinarily expected of public employees. Rather than merely serving as a sounding board to provide the Governor with a variety of outside viewpoints, the Advisory Commission was created to address "a need to coordinate and integrate policy on all aspects of domestic violence at the highest levels of state government and to broaden the scope of the Commission's inquiry to include the response of the health, human services, educational and business communities."⁷⁰ Pursuant to the Executive Order, the Advisory Commission is required to consider the need for further legislation concerning domestic violence, evaluate on a continuing basis the governmental (law enforcement, judicial, health and human service systems) response to victims, consider further policy initiatives to enhance interagency communication and cooperation, and consider measures to prevent and reduce the incidence of domestic violence through public education. These goals are similar to those imposed on government agencies within the Commonwealth. *See St. 1990 c. 403, §14-16*. For example, the Batters Treatment Subcommittee, which is chaired by the Commissioner of DPH, is reviewing current guidelines for the certification of batterers treatment programs by DPH. DPH, working with this subcommittee, has prepared a set of proposed amendments to the current guidelines. DPH is planning to hold a public hearing on the guidelines before finalizing them. We note that, pursuant to statute, DPH is charged with amending current, and promulgating additional, guidelines. The work of the subcommittee on this issue amounts to working with the DPH on a statutorily mandated task.

Similarly, the Transition Subcommittee planned to review a needs assessment, conducted privately on behalf of DSS, which identified the most pressing needs in shelters and related services. Pursuant to §51 of Chapter 126 of the Acts of 1994, the subcommittee would then evaluate the research and develop programmatic recommendations identifying gaps in service. These recommendations were required to be forwarded to the House and Senate Committees on Ways and Means by October 1, 1994. We find that this statutory requirement constitutes legislative recognition that the Advisory Commission (through its subcommittees) performs tasks ordinarily expected of government employees. Here, the Legislature has directed the subcommittee to perform a specific service and to report its results to the Legislature by a particular date. Such a statutorily mandated evaluation of state programs might otherwise be the responsibility of DSS or other executive branch employees. Likewise, the Uniform Enforcement Subcommittee, in creating law enforcement guidelines, appears to be performing a task ordinarily expected of government employees. This is because, pursuant to statute, the development of domestic violence response guidelines would be the responsibility of local law enforcement agencies themselves. *See St. 1990 c. 403,*

§15. We find that the services expected of the subcommittees go well beyond merely providing a variety of private viewpoints.

Finally, with regard to the work product of the Advisory Commission and its subcommittees, we find significant formality. For example, several subcommittees have drafted extensive guidelines for use and implementation by various public agencies, including DPH, the Commonwealth's district attorneys and state and local police. In contrast, in *EC-COI-93-22*, the advisory council analyzed various industries and crafted reports, but such reports and the recommendations contained therein did not amount to policies or programs which were readily adopted and implemented by executive branch agencies. Here, the Advisory Commission's work product in the nature of guidelines is specifically created with input from, and for adoption by, public agencies.

Applying all of the foregoing factors, we conclude that the Advisory Commission is an instrumentality of the Governor's Office. With the exception of the Commission's discretionary creation by executive order, we find that the Advisory Commission functions in a manner resembling a governmental agency rather than a mere sounding board to provide a variety of private viewpoints. We therefore conclude that Advisory Commission members who are not already state employees will be considered state employees for purposes of G.L. c. 268A. Because, however, Advisory Commission members are not compensated for their services, the "private members" will be considered special state employees.^{8/}

2. Limitations Imposed by G.L. c. 268A

As special state employees, private members of the Advisory Commission will be impacted by the conflict of interest law in a less significant manner than those members who are otherwise employed by the Commonwealth. Sections 4, 6 and 7 of G.L. c. 268A are relevant in this case.

a. Section 4

Section 4(a) of G.L. c. 268A prohibits a state employee from directly or indirectly receiving or requesting compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee from acting as an agent or attorney for anyone other than the Commonwealth or a state agency in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

A special state employee is subject to the prohibitions of §4(a) and (c) only in relation to a particular matter (1) in which he has at any time participated^{9/} as a state employee, or (2) which is or within one year has been a subject of her official responsibility,^{10/} or (3) which is pending in the state agency in which he is serving. Clause (c) is applicable only to a special state employee who serves on more than sixty days during a period of three hundred and sixty-five consecutive days.

Under §4(c), for example, a private member would be prohibited from representing a private party before the Advisory Commission, as such representation would be in connection with a particular matter for which the Advisory Commission members have official responsibility. However, private members will not be precluded from appearing before state agencies other than the Advisory Commission with regard to matters unrelated to the work of the Advisory Commission. As for §4(a), a private member could not be privately compensated to prepare a report or other documents for submission to the Commission or any of its subcommittees. See *EC-COI-93-5* (state employee may not receive private compensation for making submissions to state agency). Again, we emphasize that the §4(a) restriction on compensation would apply only with regard to matters before the Advisory Commission. A private member would not therefore be prohibited from preparing documents for submission to other state agencies. Other than the limited situation

described above, however, it is unlikely that a private member will receive private compensation in relation to any particular matters in which he has participated or which are under his official responsibility as an Advisory Commission member, thereby avoiding issues under §4(a). Rather, we think that the Advisory Commission's tasks are more likely to raise issues under §6 of the conflict of interest law.

Section 6

Section 6 of G.L. c. 268A prohibits a state employee from participating in a particular matter in which the employee, an immediate family member, or a business organization in which he is serving as an officer, director, trustee, partner or employee has a direct or reasonably foreseeable financial interest. Under this section, for example, a private member who is employed by a "business organization" (even if a non-profit organization) would be subject to the §6 restriction to the extent that the Advisory Commission takes up matters in which his employer has a direct and immediate, or a reasonably foreseeable, financial interest.^{11/} We note that §6 requires a state employee to notify his appointing authority in writing of the financial interest. The appointing authority must then (a) assign the matter to another employee, assume responsibility for the matter, or (c) make a written determination to be filed with the Commission that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the state employee. Copies of both the notification to the appointing authority, and the appointing authority's determination, must be forwarded to the State Ethics Commission.

Therefore, if a matter affecting the financial interests of a private member, or the private organization by which he is employed, is taken up by the Advisory Commission, that private member must abstain, make a disclosure to the Governor and await further instruction from the Governor concerning his participation. For example, if the Batterers Treatment Subcommittee is considering whether or not to require a certain number of licensed professional staff members for state certification of a treatment program, a private member who is employed by an organization providing such a treatment program will be subject to the §6 restriction. Similarly, a §6 issue may be raised if the Transition Subcommittee is considering a plan to supplement current shelter services through DSS contracts with private providers. Under such a scenario, a private member who is employed by an agency which is likely to seek such a state contract will need to comply with the §6 requirements. To the extent that a private member is aware of matters likely to be taken up by the Advisory Commission or one of its subcommittees and in which her private employer will have a reasonably foreseeable financial interest, that member may desire to seek a determination in advance from the Governor permitting her participation in those matters when they arise.

Section 7

Section 7 prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the Commonwealth, or any state agency is an interested party unless an exemption applies. Section 7 is implicated if a private member is to receive compensation that derives from a contract with a state agency. As a special state employee, however, such a private member may have an interest in a state contract as long as the contract is with a state agency in whose activities she neither participates nor has official responsibility for as an Advisory Commission member. Where a private member has a financial interest in a contract with a state agency with which she has no dealings as a Commission member, the §7 prohibition may be overcome by filing with the Ethics Commission a disclosure of the financial interest in compliance with an exemption contained in §7(d). For example, §7(d) would be applicable where an Advisory Commission member employed by a private university has a financial interest in a teacher training contract between the university and the Department of Education (DOE). As long as the Advisory Commission does not participate in or have official responsibility for the activities of DOE, a disclosure pursuant to §7(d) will overcome the §7 prohibition. In contrast, where a private member has a direct or indirect financial interest in a contract with a state agency with which the Commission closely works, such as DPH, the exemption provided by §7(e) must be utilized. In addition to a disclosure to the State Ethics Commission, that exemption requires approval by the Governor.^{12/}

DATE AUTHORIZED: November 8, 1994

^{1/}Pursuant to G.L. c. 18B, §2, DSS is required to provide and administer temporary residential programs providing counseling and supportive assistance for women in transition and their children who because of domestic violence, homelessness, or other situations require temporary shelter and assistance.

^{2/}The outside section reads as follows:

The governor's domestic violence policy commission transition subcommittee shall evaluate research regarding the effectiveness of existing programs and their ability to meet required standards, and gaps and services to special needs populations such as cultural and linguistic minorities, mentally ill and substance abusing battered women, as well as teens in violent relationships and develop program recommendations to address these needs. Such evaluations shall be provided to the house and senate committees on ways and means not later than October first, nineteen hundred and ninety-four. St. 1994, c. 126, §51.

^{3/}Pursuant to 1990 Mass. Acts. c. 403, §15, each law enforcement agency is required to adopt local guidelines for law enforcement response to domestic violence. In addition, under G.L. c. 209A, §6, as amended by St. 1990, c. 403, §7, upon investigating an incident of domestic violence, police are required to file a written incident report in accordance with local law enforcement agency standards.

^{4/}Pursuant to G.L. c. 6, §156, the MCCJ, among other functions, is charged with encouraging and disseminating law enforcement and criminal justice information.

^{5/}A state agency is defined as "... any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town." G.L. c. 268A, §1(p).

^{6/}Approximately 60% of the current Advisory Commission members are state employees.

^{7/}Executive Order No. 357, July 8, 1993.

^{8/}"Special state employee," a state employee:

(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

(2) who is not an elected official and

(a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

(b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

^{9/}"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{10/}"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

^{11/}We have previously decided that regulations themselves are not particular matters, but that the decisions and determinations made during the process of promulgation are particular matters. *See EC-COI-87-34*. Here, decisions and determinations during the process of creating statutorily required guidelines would be particular matters even if the guidelines themselves are not. To the extent that a private member's employer will have a financial interest in those decisions and determinations, §6 is relevant.

¹²Ordinarily, when a full-time state employee holds an additional state position, an issue under §7 arises. Here, however, because state employee members of the Advisory Commission serve on the Commission by virtue of their primary state employment, we do not find that they hold more than one state position. *See EC-COI-84-147; 84-148*. In other words, those members of the Advisory Commission who are otherwise employed by the Commonwealth have only one state contract, thereby avoiding a §7 issue.